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No. 94-1770

Supreme Court, U.S.
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In the
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1994

MELODY DAVILA, *et al.*,

Petitioners

vs.

COUNTY OF LOS ANGELES, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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In the

SUPREME COURT OF THE UNITED STATES
October Term 1994

MELODY DAVILA, *et. al,*

Petitioners,

vs.

COUNTY OF LOS ANGELES, *et. al.*,

Respondents.

Respondents respectfully request denial of the Petition for Writ of Certiorari, which seeks review of a decision by the Supreme Court of California not to review an unpublished opinion of the California Court of Appeal.

JURISDICTION

Although the caption to the Petition for Writ of Certiorari lists the County of Los Angeles as a respondent, this is incorrect since the opinion below, to which the writ is directed, does not apply to the County of Los Angeles but only to Michael Rodriguez, Jeffrey Lammers and Michael Dimarzo, who were employees of the County of Los Angeles at the time of the incident giving rise to the underyling civil rights claims.

SUMMARY OF ARGUMENT

The California Court of Appeal applied the correct federal standard for testing the sufficiency of plaintiff's second amended complaint for violation of civil rights, which plaintiffs filed in state court. Pursuant to state procedure, defendants properly filed a demurrer which normally tests the sufficiency of a pleading by the adequacy of factual allegations; however, the Court of Appeal expressly recognized and followed the established rule that federal pleading standards must be used to assess whether a Section 1983 claim has been stated. The unique procedural posture of this case, including a stipulation by counsel at oral argument on appeal, permitting the Court to consider the facts contained within the police report, makes it a poor

candidate for writ of certiorari, if any controversial issues had been raised by Petitioner's application.

PROCEDURAL POSTURE AND FACTUAL BACKGROUND

On March 10, 1990, the decedent was taken into custody for public intoxication by Los Angeles Sheriff's Department patrol deputies. As discussed in more detail below, decedent was later released from the patrol car, subsequently stepped from the curb into traffic and was struck and killed by a passing motor vehicle. Petitioners are the heirs of the decedent, Henry Davila. In a complaint filed January 29, 1991, in the California Superior Court, plaintiffs alleged a state statutory cause of action for wrongful death and civil rights allegations pursuant to 42 U.S.C. § 1983.

Several months later in 1991, defendants County of Los Angeles, Michael Rodriguez, Jeffrey Lammers and Michael Dimarzo, pursuant to state procedure, filed a demurrer to the Complaint, on grounds, *inter alia*, that recklessness was not adequately pleaded as to the civil rights claims. The trial court sustained the demurrer to the wrongful death cause of action against all defendants, without leave to amend, but permitted amendment as to civil rights claims so plaintiffs could allege recklessness by the defendants.

Plaintiffs then filed a first amended complaint, against the individual officers only, on June 17, 1991, alleging state tort and civil rights violations. Once again, plaintiffs neglected to allege that the decedent could not care for himself because he was intoxicated; they also failed to adequately plead recklessness. This time the trial court dismissed the action, giving rise to plaintiffs' first appeal.

The Second Appellate District for the State of California issued an unpublished opinion (attached inadvertently to the Petition for Writ of Certiorari as Apx B-1) remanding to the trial court, and thereby permitted plaintiffs another opportunity to remedy the defective pleading on both wrongful death and civil rights claims. This appellate opinion is significant because it gives rise to the unique procedural posture of this case where, at oral argument, the court encouraged the parties to provide further factual background pertinent to the immunities issues. The court's unpublished opinion records the stipulation of the parties to have the appellate court consider the facts contained within the police report which was officially lodged with the Court of Appeal, following the hearing. (See Petition for Writ of Certiorari, Apx. B-5)

On remand, plaintiffs filed a second amended complaint (attached to the Petition for Writ of Certiorari as Apx. C-1) alleging a state cause of action for wrongful death and civil rights violations by the individual officers only. On May 27, 1993, the trial court sustained with leave to amend, defendant's demurrer on the civil rights claims against the individual officers, since plaintiff's allegations did not

adequately plead deliberate indifference under federal case law. Plaintiffs elected not to file an amended pleading, causing the trial court to dismiss the action, and giving rise to plaintiffs' second appeal to the California Court of Appeal.

The California Court of Appeal had before it plaintiffs' second amended complaint alleging in conclusory terms that the individual officers acted with "deliberate indifference," as well as the stipulated facts (which included the police report setting forth that the decedent asked to be dropped off at a particular location near his home so as to avoid embarrassment which might ensue from decedent's release from a sheriff's patrol car).

The Court of Appeal found, *inter alia*, that under the facts known to the court and the applicable law, the officers detained and released the decedent "pursuant to the discretion which is vested in police officers". (See Petitioner's Supplemental Appendix, Apx-8.) The Court of Appeal examined case law on the issue of whether a duty or special relationship was created by the officers when they arrested and handcuffed the decedent and released him at a location decedent stated was near his home. The Court held that there was a duty of care owed to decedent "for the period he was handcuffed in the patrol car" (See Petitioners' Supplemental Appendix, Supp.Apx-7.) The Court of Appeal found no case law precedent suggesting that defendants had a duty to the decedent after his safe release from custody: "It is obvious from our reading of the cases that there was not definitive precedent on the issue of duty under the circumstances of the instant case." (Please see Petitioners'

Supplemental Appendix, Supp.Apx-6.) However, as to the state law causes of action, the Court found, citing *Van Truong v. James*, 168 Cal.App.3d 833, 835, 215 Cal.Rptr. 33 (1985), that under clearly established case law the actions of the officers were immunized and that "decedent's injuries were sustained as a result of his voluntarily intoxicated state, not because the officers released him." (Please see Petitioners' Supplemental Appendix, Supp.Apx-9.)

The Court expressly recognized that "California courts apply federal law in determining whether a plaintiff has sufficiently pleaded a civil rights violation." (Please see Petitioners' Supplemental Appendix, Supp.Apx-9.) Under the facts known to the court from the first appeal and the stipulated evidence contained in the police report, the Court of Appeal found the pleadings in the second amended complaint to be insufficient and conclusory, particularly with respect to allegations concerning the officers' supposed "deliberate indifference."[1]

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[1] While the Court of Appeal did not expressly base its decision on the doctrine of "qualified immunity", it apparently accepted of the officers' statement in the police report that the decedent requested he be dropped off at the location in question near his home. Given the Court's finding that the decisional law is unclear on whether the officer's owed decedent a duty following their discretionary decision to release decedent from the vehicle, clearly all the elements for supporting "qualified immunity" were present in the view of the Court. In *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989) the dissent noted that in cases such as these where officers truly do not create the danger to plaintiff,

Since plaintiff-petitioners declined to amend their second amended complaint after the opportunity was provided to them by the trial court, the Court of Appeal affirmed the trial court dismissal of the complaint following plaintiff's unwillingness (or inability) to follow the instructions of the trial court. (Please see Petitioners' Supp.Apx-10.) The Supreme Court of California "in bank" denied Plaintiffs' Petition for Review (See Petitioners' Apx. A-1).

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liability is precluded under the holding of *DeShaney v. Winnebago County*, 489 U.S. 189, 109 S.Ct. 998 (1989) so that "it is unnecessary to consider whether [defendants] are entitled to a qualified immunity defense, given that the Due Process Claim does not require the State to protect [plaintiff] from her unknown assailant." *Wood* 879 F.2d at 601.

Here, the Court of Appeal expressly found the officers' decision to release was within their discretion and found that the decisional law did not provide "definitive precedent" although *Truong* strongly suggested that there would be no liability in such circumstances. Hence, the burden was, in effect, shifted to plaintiffs who would have to show "the law clearly proscribed the actions the defendant took" *Barts v. Jasper*, 865 F.2d. 1187 (11th Cir. 1989), *cert. denied*. As a consequence, the Court of Appeal therefore found all the elements for "qualified immunity" even if plaintiffs had, *arguendo*, adequately pleaded a Due Process violation.

REASONS FOR DENYING WRIT OF CERTIORARI

I.

The Unique Procedural Posture of This Case, Including a Stipulation by Counsel to Permit the Court of Appeal to Consider Facts Contained in The Police Report, Make This Case a Poor Candidate for Certiorari Review.

It is well established that the United States Supreme Court grants the discretionary Writ of Certiorari "only when there are special and important reasons". Rule 10 of the *Rules of the Supreme Court of the United States*. The court's aim is to resolve conflicts within the lower courts and establish general principles on important legal issues so that lower courts can apply those principles in the great bulk of cases. It is self-evident that where there is a unique procedural posture unlikely to recur, the precedential value of Supreme Court review is lost.

Moreover, as will be argued further below, the California Court of Appeal applied settled California law

holding that a federal standard for review of the adequacy of Petitioners' complaint was appropriate.

> As one commentator notes:
>
> As Justice Stevens once said, "the Court seldom takes a case merely to reaffirm settled law." *Estelle v. Gamble*, 429 U.S. 97, 115 (1976) (dissent). Certainly, to the extent that a "correct" decision is a restatement of "settled law", review on certiorari becomes patently inappropriate.

See, R. Stern, et al., *Supreme Court Practice* (7th Ed. 1993) 193.

In the case at bar, the unique procedural posture originated because plaintiffs elected to combine state law causes of action with federal civil rights claims against public officials entitled to statutory and common law immunities, in a state court forum. This means that as to the state law causes of action, plaintiffs were required under state law pleading requirements to adequately plead sufficient facts to state a cause of action (fact pleading) while as to the civil rights claims arising from the same factual circumstances, plaintiffs were required only to state facts sufficient to put defendants on notice of the claims against them (notice pleading).

Furthermore, under state law, plaintiffs were required to state facts sufficient to demonstrate the non-applicability of statutory immunities applicable to the state law causes of action. This complex of pleading requirements was brought about by plaintiffs' election of mixed federal and state claims

and plaintiffs' choice of forum and resulted in a demand by the Court of Appeal for more factual specificity which would bear on the state law causes of action and the applicable immunities.

Therefore, the Court of Appeal was not applying "heightened pleading requirements" prohibited by the Supreme Court decision in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, ___ U.S. ___, 113 S.Ct. 1160, 112 L.Ed.2d 517 (1993), when it requested that the parties provide further facts pertinent to the state law causes of action and applicable immunities. In response, to the Court's legitimate appetite for more facts bearing on the state law cause of action and applicable immunities, the parties stipulated to permit the court to receive into evidence and consider the facts contained within the police report, which was subsequently lodged with the Court, following the hearing. (See Petitioner's Appendix, Apx. B-5.)[2]

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[2] Procedurally, this might be viewed as an application of the doctrine of "judicial notice" which permits a court to view facts outside the four corners of the pleading. The Court of Appeal expressly stated in its second decision that "We also consider matters which may be judicially noticed." (See Supp. Apx.-2 in Petitioners' Supplemental Appendix.) However, since the parties *stipulated* to introduction of factual material through the police report the situation might also be seen as a permissible conversion of the demurrer to a Motion for Summary Judgment. State courts within California are permitted this device much as federal courts may convert a 12(b)(6) Motion to Dismiss into a Rule 56 Motion for Summary Judgment. *See*, F.R.Civ.P. 12(c).

Once, having admitted into evidence the facts contained within the police report for purposes of assessing the validity of the state law cause of action and pertinent immunities, those facts could also be considered in a determination of the validity of the civil rights claims. At this point the Court was no longer limited to the facts recited in the four corners of the complaint, pursuant to the stipulation of the parties. In this manner, the Court of Appeal was permitted to consider facts contained within the police report which include a statement by one officer that the decedent, who seemed only mildly impaired, asked for a ride home and then requested he be dropped off at a nearby intersection so that embarrassment would be avoided by his wife seeing him released from the custody of a police vehicle. It is in relation to these facts, ascertained by the Court of Appeal, that it may fairly be said that plaintiff's allegations of "deliberate indifference" are merely conclusory.

As a result, the decision of the California Court of Appeal does not in any fashion frustrate federal law by imposing substantive limitations on Petitioners' rights. Unlike *Brown v. Western Ry. of Ala.*, 338 U.S. 294, 70 S.Ct. 105, 94 L.Ed. 100 (1949), cited by Petitioners, California pleading rules were not utilized here. Instead, the Court of Appeal expressly recognizing the supremacy of federal law, merely required Petitioners to plead why they satisfied the "deliberate indifference" standard. Despite being given several bites at the apple, Petitioners were unable or unwilling to allege facts demonstrating liability under

federal law. Instead, they desire this Court to permit them to allege mere conclusions, to disregard the facts known by all to be true, and to be allowed to proceed to trial with a patently frivolous case. This they should not be permitted to do.

II.

California Courts, Including the Court of Appeal in This Action, Recognize and Apply Federal Standards for Measuring the Adequacy of A Civil Rights Complaint Brought in State Court.

Petitioners contend that California courts are confused about whether they should apply state standards or federal standards for assessing the adequacy of a civil rights claim brought in the state court forum, citing *Bach v. County of Butte*, 147 Cal.App.3d 554, 195 Cal.Rptr 268 (1983) (See Petitioners' Petitior, page 8). *Bach* did indeed note that California courts had earlier applied state standards for assessment of the acequacy of a civil rights claim brought in state court, but that court squarely held:

> Therefore, in light of *Brown* we hold that the state courts of California should apply federal

> law to determine whether a complaint pleads a cause of action under section 1983 sufficient to survive a general demurrer.

Bach, 147 Cal.App.2d 563, 195 Cal.Rptr. 273.

While there may have been some discrepancy on this point prior to the *Bach* decision in 1983, a succession of subsequent California cases have reaffirmed the position taken by *Bach.*[3] In *Bullock v. City of San Francisco*, 221 Cal.App.3d 1032, 271 Cal.Rptr. 44 (1990), the Court stated that:

> 'California courts should apply federal law to determine whether a complaint pleads a cause of action under section 1983 sufficient to survive a general demurrer.' [Greene v. Zank, 158 Cal.App.3d 497 (1984)]

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[3] The *Bach* court held that California courts must apply federal law to measure the adequacy of a civil rights complaint in state court, thus ensuring so far as possible that the same outcome would be reached on this issue whether suit is brought in the federal or state court forum. Therefore it is odd that Petitioners should complain that:

> The general rule articulate [sic] in *Bach* conflicts with this Court's decision in *Felder v. Casey* 487 U.S. 131, 108 S.Ct. 2302 (1988) [prohibiting] different outcomes based solely on whether the claim is filed in state or federal court.

(See Petitioners' Petition for Certiorari, at page 8.]

Bullock, 221 Cal.App.3d 1087, 271 Cal.Rptr. 52.

More importantly, for present purposes, the Court of Appeal in the case at bar expressly recognized and applied this legal position. Citing to *Bullock, supra*, the Court of Appeal stated: "California courts apply federal law in determining whether a plaintiff has sufficiently pleaded a civil rights violation." (See Petitioners' Supplemental Appendix, Apx.-9) Hence, this is not an appropriate case to educate California courts on this point, even if such a conflict within California state courts still existed.

III.

Considering the Totality of Facts Before the California Court of Appeal, The Second Amended Complaint was Legally Inadequate Even Under Liberal Pleading Requirements of the Federal Rules of Civil Procedure and Without Any Heightened Pleading Requirement.

The adequacy of a civil rights complaint, whether brought in state or federal courts, is measured by the pleading requirements established by federal law guided by *Federal Rule of Civil Procedure* 8(a) which requires a "short

and plain statement of the claim ***showing that the pleader is entitled to relief.***" (emphasis added). *Leatherman, supra,* held that in relation to civil rights allegations against municipalities there can be no "heightened pleading requirement" and Rule 8(a) must ordinarily be the guiding light.

However, *Federal Rule of Civil Procedure* 8(a) is not devoid of teeth of its own. The pleader must still show that he or she is "*entitled to relief*" under the substantive law underlying the claimed injury. Indeed, this Court, in *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), recognized that an action brought under Section 1983 may be dismissed for failure to state a claim if it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Although the complaint need not be factually detailed, nonetheless it "must give the defendant fair notice of what the plaintiff's claim is and the grounds *upon which it rests.*" *Id.*, 355 U.S. at 47 (emphasis added). Consequently, while Rule 8(a) relieves a plaintiff from pleading technicalities under older Code pleading rules, the rule still requires a plaintiff to set forth factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory. *See, Moten v. American Linen Supply Co.*, 155 F.R.D. 202, 204 (D. Kansas, 1994). *See also Askanase v. Fatjo,* 148 F.R.D. 570 (S.D. Tex. 1993) (even cross claims which are given additional pleading leeway require factual specificity and more than merely conclusory allegations.)

As a consequence, courts are entitled to demand a sufficient factual basis for a claim, even in a regime of notice pleading. The adequacy of the claim made by the pleader is measured by the requirements of the substantive law underlying the claim.

In the case at bar, Petitioners alleged Section 1983 civil rights violations of Due Process under the Fourth and Fourteenth Amendments to the United States Constitution against individual officers. It is well established that a prerequisite to a successful suit against individual officers requires the pleading and proof of "deliberate indifference" or "recklessness" rather than mere negligence. *See, e.g. Davidson v. Cannon,* 474 U.S. 344, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986).

Here, while Petitioners alleged in a conclusory fashion that officers acted with "deliberate indifference", the facts pleaded and accepted by the Court of Appeal, show that the officers acted at most with mere negligence, so plaintiffs have failed to make out their constitutional claim. In *Davidson v. Cannon*, *supra,* where prison officials acted negligently or without "due care," this Court affirmed a Third Circuit decision finding no Due Process violation based on mere negligence. In the case at bar, the California Court of Appeal found on the basis of the record before it, including the facts stipulated into evidence at the oral hearing, that the conclusory pleading of "deliberate indifference" could not overcome the clear evidence that the officers had, at most, acted negligently in dropping off the intoxicated decedent at the location he requested near his

home. Clearly a conclusory allegation of "deliberate indifference" will not withstand facts known to the court tending only to support mere negligence.

IV.

Apart From the California Court's Finding That Petitioners' Pleaded and Made a Showing of Mere Negligence Rather Than Deliberate Indifference, Its Decision to Affirm Dismissal Was Justified Because of a Lack of Duty Under This Court's Due Process Analysis.

The California Court of Appeal suggested that while a "special relationship" may have existed while the decedent remained within the patrol car, the relationship terminated once the decedent was dropped off safely at the intersection he stated was near his home. (See Petitioner's Appendix, Supp. Apx-7.) Putting aside Petitioners' failure to state and make a showing of more than mere negligence, and ignoring the availability of a "qualified immunity" defense to the individual officers, the decision of the Court of Appeal was independently justifiable on the basis of this Court's Due

Process jurisprudence following *De Shaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 103 L.Ed.2d 249, 109 S.Ct. 998 (1989).

The *De Shaney* court noted that prior decisions including *Youngberg v. Romeo*, 457 U.S. 307, 73 L.Ed.2d 28, 102 S.Ct. 2452 (1982), "stand only for the proposition that when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *De Shaney*, 489 U.S. at 199. However, when the state takes temporary custody of an individual and then releases him to the "free world", in no worse position than if the State had not acted at all, the state does not continue as permanent guarantor of the safety of the released individual. This is true even if the state knows of dangers the individual may continue to face in the "free world."

> Petitioners concede that the harms Joshua suffered did not occur while he was in the state's custody, but while he was in the custody of his natural father who was in no sense a state actor. While *the state may have been aware of the dangers that Joshua faced in the free world*, it played no part in their creation, nor did it do anything to render him any more vulnerable to them. That the state once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no

> worse position than that in which he would have been had it not acted at all; the state does not become the permanent guarantor of an individual's safety by once having offered him shelter.

De Shaney, at 201 (emphasis supplied).

The suggestion by the Court of Appeal that any duty owed by the officers only existed while the decedent was handcuffed in the police car and did not continue after decedent's safe release onto the sidewalk he stated was near his home appears well grounded under the *De Shaney* analysis of Due Process obligation. This reasoning is independent of Petitioners' failure to make a showing on the deliberate indifference requirements which provided the principal basis for the decision of the Court of Appeal. It provides further support for the correctness of the decision of the California Court of Appeal, making it improvident to grant certiorari in this case.

CONCLUSION

The legal uncertainty that may once have existed in California over how to measure the adequacy of Section 1983 pleadings in California courts is not a sufficient basis for an extraordinary review pursuant to Writ of Certiorari, particularly since the Court of Appeal in the underlying case applied the current and correct federal pleadings standard and did not impose a "heightened pleading requirement" on

Petitioners. Even if Petitioners had pointed to a genuine and important legal controversy, the unique procedural posture of the case, including a stipulation by counsel to permit into evidence the contents of the police report, make this case an extremely poor candidate for Certiorari review. The decision is justified because of the California Court's determination that Petitioner can make no showing that Respondents' actions were anything other than merely negligent, and its findings are consistent with the application of the doctrine of qualified immunity and the absence of a duty or special relationship under prevailing Due Process jurisprudence. The Petition for Writ of Certiorari should, therefore, be denied.

Dated: July 27, 1995

Respectfully submitted,

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